

BEFORE THE
DEPARTMENT OF CONSUMER AFFAIRS
BUREAU OF AUTOMOTIVE REPAIR
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

C2K ENTERPRISES, INC., DBA
TRANSMASTERS TRANSMISSIONS;
RICKEY FRYE, JR., PRES/TREAS; JAMIE
L. KELLEY-FRYE, SECY

Automotive Repair Dealer Registration No.
ARD 250149,

Respondents.

Case No. 77/15-6200

OAH No. 2018041271

PROPOSED DECISION

Theresa M. Brehl, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on October 17 and 18, 2018, in San Diego, California.

David E. Hausfeld, Deputy Attorney General, Department of Justice, State of California, represented complainant Patrick Dorais, Chief, Bureau of Automotive Repair, Department of Consumer Affairs, State of California.

William Dean Ferreira, Attorney at Law, Automotive Defense Specialists, represented respondents C2K Enterprises, Inc., doing business as Transmasters Transmissions, and its president and treasurer, Rickey-Frye, Jr. (referred to collectively as "Transmasters").

Respondent Jamie L. Kelley-Frye, C2K Enterprises, Inc.'s secretary, did not appear.¹ The Accusation and Notice of Hearing were served on Ms. Kelley-Frye in compliance with Government Code sections 11505 and 11509. Therefore, pursuant to Government Code section 11520, this matter proceeded as a default against Ms. Kelley-Frye, and the decision shall be binding on her.

¹ When asked if he also represented Ms. Kelley-Frye, Mr. Ferreira responded that he only represented the corporation and Mr. Frye and stated that there were no allegations made against Ms. Kelley-Frye.

The matter was submitted on October 18, 2018.

SUMMARY

Complainant sought to revoke Transmasters's automotive repair dealer registration pursuant to Business and Professions Code section 9884.7, subdivision (a)(1), (4), (6), and (7), based on allegations that during two undercover operations Transmasters made false and misleading statements; committed fraud; failed to perform repair work in accordance with applicable sections of the Business and Professions Code and California Code of Regulations; performed and charged for an unauthorized repair; and damaged some parts, but did not replace them. Complainant also sought reimbursement of investigation and prosecution costs totaling \$38,509.04.

Transmasters conceded that it failed to replace some of the seals and gaskets when it rebuilt the two undercover vehicles' transmissions in violation of California Code of Regulations, title 16, section 3361.1. Transmasters denied the remaining allegations. Transmasters asserted that revocation was not the appropriate remedy because the employees who communicated with the undercover operatives no longer worked for respondents, Transmasters's written warranty language has since been updated to more clearly communicate warranties applicable to elective transmission repairs, and Transmasters's current employees recently participated in training to ensure appropriate communications with consumers.²

Complainant proved by a preponderance of the evidence that cause exists to discipline Transmasters's automotive repair dealer registration. However, outright revocation is not necessary for public protection under the circumstances of this case. Transmasters's registration shall be placed on probation for three years, with appropriate conditions to protect the public, and Transmasters's shall pay the bureau \$7,500 for investigative and prosecution costs incurred.

FACTUAL FINDINGS

Registration and License History

1. The bureau issued Automotive Repair Dealer (ARD) Registration Number ARD 250149 to C2K Enterprises, Inc., doing business as Transmasters Transmissions;

² Although not specifically argued during this hearing, the Notice of Defense asserted Transmasters's intention to introduce the following affirmative defenses: "agency misconduct," "entrapment," and "destruction of subject matter."

Rickey Frye, Jr., as president and treasurer; and Jamie L. Kelley-Frye, as secretary.³ The ARD registration will expire on April 30, 2019, unless it is renewed.

No evidence was presented of any prior discipline against the ARD registration or against either of the individual respondents.

Jurisdictional Background

2. On December 15, 2017, complainant signed the accusation in his official capacity. The accusation alleged Transmasters's ARD registration should be disciplined based on allegations arising from two undercover operations conducted in July 2015, using a 2002 Chevrolet Monte Carlo, and in January 2016, using a 2002 Chevrolet Tahoe.

3. With respect to the first, July 2015, undercover operation, the accusation included four causes for discipline which alleged as follows:

- First Cause for Discipline - Pursuant to Business and Professions Code section 9884.7, subdivision (a)(1). Transmasters made untrue or misleading statements by: Charging for a rebuild without performing all work required by California Code of Regulations, title 16, section 3361.1; telling the undercover operator that "the pump drive shaft was sheared and that the fracture contaminated everything, including the torque converter and the electronics"; stating "the transmission would need to be stripped down to the case and everything had to be replaced" when "the only parts that needed to be replaced were the oil pump drive shaft, the filter and some fluid"; charging and receiving payment for "parts that were not replaced"; replacing "parts that did not need to be replaced"; and damaging "parts during the repair";
- Second Cause for Discipline - Pursuant to Business and Professions Code section 9884.7, subdivision (a)(4). Transmasters committed fraud by: Telling the undercover operator that "the transmission was in need of a rebuild"; charging for a rebuild and not performing all the work required to rebuild a transmission under California Code of Regulations, title 16, section 3361.1; charging for and receiving payment for "parts that were not replaced"; replacing "parts that did not need to be replaced"; and damaging "parts during the repair";
- Third Cause for Discipline - Pursuant to Business and Professions Code section 9884.7, subdivision (a)(6). Transmasters failed to comply with the following Business and Professions Code sections:

³ The accusation alleged the registration was issued in 2007, which was consistent with Mr. Frye's testimony that he has owned the business for 11 years. The bureau's written certification stated the ARD registration was issued in 1997.

- Section 9884.7, subdivision (a)(7) - Transmasters did not “follow accepted trade standards” because Transmasters “did not rebuild the transmission as invoiced and charged”; “failed to rebuild the transmission to meet the minimum standards required”; and “failed to follow accepted trade standards in that the replacement torque converter had excessive end play, the second clutch apply ring and release are impaired, the input clutch slips and two wiring harness retainers are missing”;
- Section 9884.8 - Transmasters did not “comply with invoice and work order requirements” because Transmasters’s invoice listed an “impermissible ‘Supplies Charge’”; and
- Section 9884.9 - Transmasters did not “obtain a signature on the invoice for the work performed and for additional authorized work.”
- Fourth Cause for Discipline - Pursuant to Business and Professions Code section 9884.7, subdivision (a)(6). Transmasters’s failed to comply with the following sections in title 16 of the California Code of Regulations:
 - Section 3356, subdivision (c) - Transmasters “billed for shop supplies”⁴;
 - Section 3361.1 - Transmasters “failed to rebuild the transmission to meet the minimum requirement standards”;
 - Section 3371 - Transmasters “made false and misleading statements” which Transmasters “knew to be false at the time they were made”; and
 - Section 3373 - Transmasters “created a false and misleading record by issuing an invoice and charging for a rebuild,” failing “to provide all parts listed on the invoice,” and not performing “all of the work required to rebuild a transmission as required by CCR section 3361.1.”

4. With respect to the second, January 2016, undercover operation, the accusation included four causes for discipline which alleged as follows:

- Fifth Cause for Discipline - Pursuant to Business and Professions Code section 9884.7, subdivision (a)(1). Transmasters made untrue or misleading statements by: Charging for a rebuild without performing all the work required by California Code of Regulations, title 16, section 3361.1; recommending

⁴ As is explained further in the legal conclusions, section 3356 has undergone substantial revisions since the accusation was filed, and it no longer contains the same provisions under the same subdivisions. Subdivision (g) prohibits charging for shop supplies in the current version of section 3356.

installation of “a rebuild kit, a rebuilt torque converter, a shift kit, replacing the stripped out shell, the sprag, the bearing kit, the four-wheel drive sprocket and the wiring harness” when “the only part that needed to be replaced was the reaction sun shell”; and charging and receiving payment for “parts that were not replaced”; and replacing “parts that did not need to be replaced”;

- Sixth Cause for Discipline - Pursuant to Business and Professions Code section 9884.7, subdivision (a)(4). Transmasters committed fraud by telling the undercover operator that “the transmission was in need of a rebuild,” charging for a rebuild without performing all the work required to rebuild a transmission under California Code of Regulations, title 16, section 3361.1; and charging for and receiving payment for “parts that were not replaced”; and replacing “parts that did not need to be replaced”;
- Seventh Cause for Discipline - Pursuant to Business and Professions Code section 9884.7, subdivision (a)(6). Transmasters’s failed to comply with the following Business and Professions Code sections:
 - Section 9884.7, subdivision (a)(7) - Transmasters did not “follow accepted trade standards”;
 - Section 9884.8 - Transmasters did not “comply with invoice and work order requirements” because Transmasters’s invoice listed an “impermissible ‘Supplies Charge’”; and
 - Section 9884.9 - Transmasters did not “obtain a signature on the invoice for the work performed and additional authorized work.”
- Eighth Cause for Discipline - Pursuant to Business and Professions Code section 9884.7, subdivision (a)(6). Transmasters failed to comply with the following sections in title 16 of the California Code of Regulations:
 - Section 3356, subdivision (c) - Transmasters “exceeded the estimated price without prior approval from the customer”⁵;
 - Section 3356, subdivision (c) -Transmasters “billed for shop supplies”⁶;
 - Section 3361.1 - Transmasters “failed to rebuild the transmission to meet the minimum requirement standards”;

⁵ Neither the old version of section 3356, cited and quoted in the accusation, nor the current version of that section addresses exceeding the estimated price.

⁶ See Footnote 4, above.

- Section 3371 - Transmasters “made false and misleading statements” which Transmasters “knew to be false at the time they were made”; and
- Section 3373 -Transmasters “created a false and misleading record” by issuing an invoice and charging for a rebuild when it failed “to provide all parts listed on the invoice,” and did not perform “all of the work required to rebuild a transmission as required by CCR section 3361.1.”

The Undercover Operations

5. In 2015 and 2016, the bureau conducted two undercover operations at Transmasters. Bureau Program Representative II Kevin McKee oversaw both undercover operations and prepared an Investigation Report, dated January 27, 2017. Mr. McKee’s testimony during this hearing was consistent with the information provided in his report. According to his report, the bureau decided to conduct the undercover operations because it had “received multiple complaints from consumers regarding” Transmasters “[f]rom 2010 to 2015.” No further evidence was presented regarding the consumer complaints referenced in the report.

6. Program representatives working in the bureau’s forensic documentation lab induced malfunctions in the transmissions of a 2002 Chevrolet Monte Carlo and a 2002 Chevrolet Tahoe, and each vehicle was brought by an undercover operative to Transmasters for repair in order to investigate how Transmasters handled the diagnoses and repair transactions. Transmasters contracted with each undercover operator to “rebuild” each vehicle’s transmission.

7. Mr. McKee prepared written declarations, based on notes he took close in time to the undercover runs, which the undercover operatives, Rouzanna Ramos and Mindy Scouler, later signed under penalty of perjury. Both of the undercover operatives testified during the hearing and their declarations were received as evidence. The Transmasters employees, Randy Forbes and Phillip Foster, with whom the undercover operatives communicated during the undercover operations, did not testify. Because Ms. Ramos and Ms. Scouler could not recall all the details of the undercover operations during their hearing testimony and no Transmasters’s employees who had spoken to them about the repair work testified, Ms. Ramos’s and Ms. Scouler’s written declarations provided the most reliable and credible evidence regarding their interactions with Transmasters.

8. Douglas Giese and Richard Losee, the bureau employees who induced the malfunctions and then re-inspected the vehicles after Transmasters conducted repairs, signed

declarations, which were received as evidence, and provided hearing testimony consistent with their written declarations.⁷

THE MONTE CARLO (JULY 2015) UNDERCOVER OPERATION

9. A 2002 Chevrolet Monte Carlo, with an automatic transmission, was used for the July 2015 undercover operation. Program Representative II Douglas Giese documented and inspected the vehicle before the operation, induced a malfunction in the Monte Carlo's transmission, and documented and inspected the Monte Carlo after the undercover run. Mr. Giese has worked for the bureau for 27 years in its forensic documentation lab. Before working for the bureau, he was an automotive technician for 12 years for Yellow Cab. He has been certified by the National Institute for Automotive Service Excellence (ASE) as a Master Automotive Technician since 1987.

10. To conduct and document his inspection before the undercover run, Mr. Giese reviewed the manufacturer's manuals and other available resources, took the transmission out of the vehicle, disassembled the approximately 1,000 pieces of the transmission, inconspicuously marked and photographed the marked parts so that he would be able to tell later whether parts had been repaired or replaced, and logged the parts he inspected on a Vehicle Documentation Worksheet. He "measured the electrical resistance of each solenoid and checked for continuity to the solenoids' metal cases" and documented that the "results were within specification." He also "measured the input and reaction carriers' pinions' endplays" and found that the "results were within specification."

11. Mr. Giese installed a defective oil pump drive shaft in the Monte Carlo's automatic transmission by shearing the splines off one end of the oil pump drive shaft, which disabled the transaxle from moving the vehicle. After he completed installing the defective oil pump shaft, the vehicle would run, but it would not move forward or backward. The induced malfunction was meant to resemble a "real world" problem that could occur from wear and tear over time. According to Mr. Giese's declaration, "[c]orrecting this vehicle's transaxle defect requires replacement of the oil pump drive shaft. Replacement of the torque converter, some gaskets, seals, fluid, and the oil filter would also be appropriate at the time of the repair."

12. When the Monte Carlo was transported to Carlsbad (which is near Transmasters's shop in Encinitas) for the undercover run, the vehicle's mileage was 120,394. As directed by Mr. McKee, Ms. Ramos called Transmasters on July 29, 2015, and spoke to an employee named Randy Forbes, who was her sole contact at Transmasters during the undercover run. She told Mr. Forbes that the Monte Carlo had broken down, made a "rattling noise," and "would not go into gear." Mr. Forbes helped Ms. Ramos arrange a tow

⁷ Transmasters's argument that the bureau's witnesses committed perjury was not persuasive. There was nothing about the content of their written declarations, their testimony, or their demeanor while testifying that indicated that they were being dishonest.

to Transmasters, and he told her Transmasters would conduct a free transmission check after the vehicle arrived at the shop. When Ms. Ramos met Mr. Forbes in person at Transmasters later that day, he asked her what was wrong, and she told him that the Monte Carlo "would not move." He again told her Transmasters would conduct a free transmission inspection and provided her a written estimate titled, "Repair Order." The Repair Order noted, "Customer states that: The Transmission has shifting problems. Wont [*sic*] move/noises," and it listed "Labor Service-External Inspection of Transmission" for no charge. Mr. Forbes and Ms. Ramos spoke again over the telephone later that day, and he then told her there was "noise in the pump" and Transmasters would need to "pull the pan." He explained to Ms. Ramos that the charge would be \$255.89 for a transmission service, which would include "pulling the pan, draining the fluid, and checking the filter." Mr. Forbes also explained that if the filter was good, Transmasters "would need to tear down the transmission." Ms. Ramos authorized the \$255.89 service.

13. Ms. Ramos called Transmasters the next day and spoke to Mr. Forbes again, who then told her that the problem was "internal to the transmission." He explained that Transmasters "would need to remove the transmission and tear it down" for a cost of \$968. He stated that Transmasters "had found 'gray material' in the filter that might be 'friction material.'" Mr. Forbes told her that the tear down would be completed on Monday, August 3, 2015, and the transmission could be fixed by the end of the week. Ms. Ramos authorized the transmission tear down for \$968.

14. Ms. Ramos spoke to Mr. Forbes over the telephone three times on Wednesday, August 5, 2015. The first time she spoke to him that day, he told her "the 'pump drive shaft' was 'sheared'"; "there was 'metal throughout the unit'"; and "the 'fracture' contaminated everything, including the torque converter and the 'electronics.'" Mr. Forbes said the transmission needed to be "stripped down to the case and everything needed to be replaced"; Transmasters "would need to 'start from scratch, like it was from the factory in 2002'"; it would cost \$4,176.93; and the repair could be completed "by Friday" if the work was "started now." Ms. Ramos called Mr. Forbes back later that afternoon and asked him "how much it would cost to take the Monte Carlo as is." He said Transmasters "could not let the Monte Carlo go as is," but that Transmasters "could put it back together" for \$1,072. Ms. Ramos then also asked if the cost to repair the transmission could be reduced, and Mr. Forbes told her Transmasters "could test the 'electronics' before replacing them." He said he would talk to "Rick" and call her back, but he did not ever follow up with her regarding testing the electronics. Ms. Ramos called Transmasters about ten minutes later and told Mr. Forbes to go ahead with the repair, as she just wanted the transmission repair "done right." During that third call, Mr. Forbes told her that the repairs would have a two-year, 24,000-mile warranty and that Transmasters did "repairs to ensure the transmission would last beyond the warranty."

15. Mr. Forbes left Ms. Ramos a message on August 10, 2015, stating that the transmission was ready to be installed, it would be done the next day, and a transmission mount was bad and needed to be replaced for \$144.36. Ms. Ramos called him back that day and declined the transmission mount replacement.

16. On August 11, 2015, Ms. Ramos went to Transmasters to pick up the vehicle. At that time, Mr. Forbes told her the transmission mount “was worn out, and would break in the future.” He also told her that Transmasters had replaced the “electronics.” He showed her a two-page invoice, and he explained all the repairs and parts listed and the warranty written on the invoice.⁸ She signed the invoice, and he gave her an unsigned copy.⁹ She paid Transmasters \$4,176.93. The invoice listed the parts installed, including a rebuilt torque converter and new master rebuild kit, bands, sprag set, roller clutch, pump shaft, solenoids, speed sensors, wire harness, switches, shift recalibration kit, and transmission fluid. The invoice also included a \$10 “Supplies Charge.” When Ms. Ramos drove the Monte Carlo from Transmasters, she thought it operated properly, and there were no problems that she “could see.” Ms. Ramos returned the Monte Carlo to Mr. McKee and gave him the invoice. The Monte Carlo was then transported back to Mr. Giese.

17. Mr. Giese re-inspected the Monte Carlo, reviewed Transmasters’s invoice, and drove the vehicle. He determined that the defect he had induced (the malfunctioning oil pump drive shaft) had been repaired, he noticed that the “automatic shifts were unusually firm,” and he determined the “torque converter was operating correctly.” When he operated the Monte Carlo on a chassis dynamometer, he noted the “operating parameters recorded during this test demonstrate abnormal operation. . . . The reports show the shift times have been reduced significantly.” He also noted that the invoice indicated that the Monte Carlo had received a transmission rebuild, which meant that all seals and gaskets should have been replaced. Mr. Giese determined, based on his markings still being in place, that 12 seals and three gaskets had not been replaced. Additionally, the replacement torque converter had

⁸ Although Ms. Ramos’s declaration clearly stated that she discussed the warranty with Mr. Forbes, during the hearing she testified that she did not discuss the warranty with him. When she was asked about that discrepancy between her hearing testimony and her declaration, she responded, “whatever was in the declaration, that’s what happened.”

⁹ The undercover operatives signed and initialed copies of the invoices that were retained by Transmasters, and the copies the operatives received did not have their signatures on them. The parties spent a great deal of time questioning witnesses about whether Transmasters gave the undercover operatives copies of invoices with the undercover operatives’ signatures on them. Mr. McKee testified that he was “not sure” if the regulations required licensees to supply customers with copies of invoices with the customers’ signatures on them. Business and Professions Code section 9884.8 requires that a registered automotive dealer give the customer a copy of the invoice, but it says nothing about whether the customer’s copy must bear the customer’s signature. Business and Professions Code section 9884.9 requires a customer signature to acknowledge oral consent was made for repairs, but it does not discuss supplying the consumer with a copy with the consumer’s signature on the document. The regulations require a registered automotive dealer to supply the customer with a “legible copy” of the invoice; the regulations do not state that the customer’s copy must be signed by the customer. (Cal. Code Regs., tit. 16, §3356, subd. (j) (operative September 13, 2018); Cal. Code Regs., tit. 16, §3356, subd. (d) (operative March 4, 2007).)

excessive end play; the second clutch apply ring and release spring were damaged; and the input clutch plates were discolored consistent with heat damage, which indicated the clutch had been slipping and failure was "imminent." Mr. Giese explained during his testimony that the car was not shifting properly when it was returned, and the damaged input clutch plates were indicative of slipping, although Ms. Giese did not diagnose the cause of the slipping. Additionally, two wiring harness retainers were missing.

18. Mr. Giese concluded that because Transmasters charged for a transmission rebuild but did not replace all the gaskets and seals as required by California Code of Regulations, title 16, 3361.1, use of the term "rebuild" was misleading. Mr. Giese explained that there was no reason not to replace the seals and gaskets as required by the regulations. Mechanics may purchase replacement seals and gaskets in California compliance kits, which should have all the necessary seals and gaskets, or they may purchase individual seals and gaskets. Original Equipment Manufacturer (OEM) parts may also be purchased directly from the manufacturer if a mechanic believes OEM parts are better than the parts supplied in a compliance kit.

19. Additionally, according to Mr. Giese, replacing the electronic solenoids was not necessary, and Transmasters's invoice included an inappropriate \$10 "Supplies Charge."

20. On cross-examination, Mr. Giese acknowledged that if he saw large pieces of metal in a transmission pan, he would recommend a rebuild, as the customer might have to come back because of metal particulates in the transmission. If the malfunction had occurred over a period of time, metal shavings might have gone into the torque converter. Although Mr. Giese had induced the defect in such a way as to avoid the shavings entering the transmission when he damaged the oil pump drive shaft, a mechanic who saw metal shavings would not know that and would likely believe the damage, and metal shedding from the spine, had occurred over time and gone into the torque converter.

THE TAHOE (JANUARY 2016) UNDERCOVER OPERATION

21. Bureau Program Representative I Richard Losee documented and inspected the 2002 Chevrolet Tahoe used for the second undercover run before the undercover operation, induced a malfunction in the Tahoe's automatic transmission, and documented and inspected the Tahoe after the undercover run. Mr. Losee has worked for over 10 years in the bureau's forensic documentation lab. Before working for the bureau, he worked as an automotive technician for 37 years, including working for General Motors for 27 years, 22 years of which he worked at a Pontiac dealership where one-third of his work was on transmissions. He has been certified as an ASE Master Automotive Technician since 1984.

22. To conduct and document his inspection before the undercover run, Mr. Losee reviewed the manufacturer's manuals and other available resources to make sure the manuals had a repair path to fix the malfunction he planned to induce in the vehicle. He also drove the vehicle to make sure it was in good working order, took the transmission out of the

vehicle, disassembled it, marked and photographed the marked parts, and logged the parts he inspected on a Vehicle Documentation Worksheet.

23. Mr. Losee induced a malfunction in the Tahoe's automatic transmission by breaking the Tahoe's reaction sun shell. The malfunction caused the Tahoe to have no second, fourth, or reverse gears. According to Mr. Losee, in order to repair the malfunction, the transmission would need to be removed, the valve body removed, and a new reaction sun shell installed. The mechanic would not need to rebuild the transmission to complete the repair. The broken sun shell was chosen as the induced malfunction because it was a common problem that General Motors had in the 1990s and 2000s. When the Tahoe was transported to Carlsbad for the undercover run, the vehicle had 181,350 miles.

24. Ms. Scouler drove the Tahoe to Transmasters on January 6, 2016, and met with Transmasters's employee Phillip Foster, who was her sole contact at Transmasters. She told Mr. Foster that the vehicle would not go into reverse, and she requested the free inspection that was advertised outside the building. Mr. Foster told Ms. Scouler that the inspection would take a couple hours and he recommended a 30-point checkup at no additional charge, which Ms. Scouler authorized. Mr. Foster gave Ms. Scouler a written repair order that stated, "Customer states that: The Transmission doesn't move vehicle backwards in REVERSE," and listed "External Inspection of Transmission" and "30 Point Courtesy Check" for no charge. Mr. Foster told Ms. Scouler he would contact her with any recommended repairs and that he would not do anything without her approval. Ms. Scouler called Transmasters later that day, and Mr. Foster then explained that Transmasters needed to "drop the pan from the transmission and inspect the fluid to get a better idea of what needs to be done," which would cost \$247.36. Ms. Scouler authorized that service.

25. On January 7, 2016, Mr. Foster told Ms. Scouler that the transmission needed to be removed and taken apart to find out what was wrong, for a cost of \$895, which would be applied to the cost of the repair. He said the total to be applied to the repair would be \$1,148.12 (which was a couple dollars more than the combined total of the pan drop charge of \$247.36 and the removal charge of \$895). Ms. Scouler authorized Transmasters to remove and disassemble the transmission.

26. On January 11, 2016, Ms. Scouler called and spoke to Mr. Foster again. During that call, he told her Transmasters had "gotten everything out and apart" and completed the inspection. He recommended replacing the spark plugs and installing a "rebuild kit," rebuilt torque converter that was "California required," a "shift kit," replacing the "stripped out shell" with a hardened one, replacing the "sprag," "bearing kit," "four wheel drive sprocket," and the "wiring harness" for a total cost of \$3,559.85. He explained the repairs would include a two-year, 24,000-mile warranty, and told her the transmission would outlast the Tahoe because Transmasters used better parts than what were installed. Ms. Scouler told Mr. Foster she would call him back. When Ms. Scouler called back later that day, she asked Mr. Foster to explain to her again what was needed to repair the transmission. Mr. Foster then told her that the "shell" had "stripped out" causing no reverse, so Transmasters would replace it with a "hardened shell." Transmasters would also replace

the torque converter and install a new "rebuild kit" that included the "essentials" for the transmission "per California for rebuilds." Mr. Foster explained the difference between a used, remanufactured, and rebuilt transmission. Ms. Scouler asked him if all the parts he was recommending were for the reverse, and he responded that "nothing is upsold for things that are not needed" and he would put an estimate together to "just get the vehicle up and running." He also explained that Transmasters would replace the "electronics," which included four solenoids and a "wiring harness." Mr. Foster told Ms. Scouler that if the electronics were not replaced the transmission would have to be removed again later to replace them. He explained that the "shift kit" Transmasters would install was "like a software update to prevent future issues." Ms. Scouler told Mr. Foster she would think about it and call him back. Ms. Scouler called Transmasters again later that day and told Mr. Foster that if all the repairs were needed to fix the reverse, to go ahead with the repairs. Mr. Foster told her the repairs would "fix the reverse and take care of any issues that could happen in the future," and he said the Tahoe would be ready the following Friday.

27. Ms. Scouler went to Transmasters to pick up the Tahoe on January 15, 2016. When she got there, Mr. Foster told her that Transmasters had also installed a "neutral safety switch" for \$92, which she had not previously authorized. Mr. Foster went over the invoice with Ms. Scouler and showed her a damaged steel cylinder which he said was the broken part. Ms. Scouler paid \$3,660, signed Transmasters's copy of the invoice, and she received a copy of the invoice. Ms. Scouler drove the Tahoe from the shop and returned it to Mr. McKee, and the Tahoe was then returned to Mr. Losee at the documentation lab.

28. Mr. Losee inspected the Tahoe's transmission and determined that the defective sun shell had been replaced and the vehicle operated correctly. Mr. Losee also concluded that the manual shaft seal, transmission filter seal, four turbine shaft Teflon oil seal rings, and two stator shaft Teflon oil seal rings had not been replaced. According to Mr. Losee, the replacement of the reaction sun shell would have corrected the induced malfunction, and the additional repairs, including installing a rebuilt torque converter and replacing bearings, two input sprags, six solenoids, a pressure switch, a neutral safety switch, a servo piston, and a shift kit, were not needed to repair the transmission. He noted that the solenoids and pressure switches were in good condition, the bearings were fine when he initially inspected the vehicle, and the bearings did not need to be replaced. The "Servo piston" and neutral safety switch, which Transmasters also replaced, did not need to be replaced to fix the broken reaction sun shell. Mr. Losee described Transmasters's replacement of the unnecessary parts as an "oversell."

29. Mr. Losee explained that because the transmission was rebuilt, the technician should have replaced all the seals and gaskets, even if the mechanic believed the seals and gaskets already installed were "better" than the replacement seals and gaskets. Mr. Losee noted that eight or nine seals, out of the approximately 100 seals, bearings and gaskets, had not been replaced. Mr. Losee acknowledged on cross-examination that there was nothing wrong with the seals that were not replaced. Additionally, Transmasters's invoice included an inappropriate \$10 "Supplies Charge." Mr. Losee also concluded that because Transmasters charged for a rebuild of the transmission but did not replace all the seals as

required by California Code of Regulations, title 16, 3361.1, use of the term "rebuild" was misleading.

30. Mr. Losee did not believe the transmission work was "bad work," and other than the seals that were not replaced, he saw nothing for which the undercover operator was charged that was not replaced. He acknowledged that 180,000 miles would be "a lot" for a truck, and that based on the mileage a mechanic could recommend doing a complete rebuild or overhaul, and it would be up to the consumer. Mr. Losee did not believe it would be "fraud" to recommend a rebuild; it would depend on how it was presented to the consumer. Additionally, replacement of solenoids at 180,000 miles might be recommended if it was determined there was a problem with them or due to the "true" mileage. Mr. Losee explained that the vehicle's mileage may not equate to the mileage on the transmission. He also stated that when a sun shell breaks, there would not normally be metal circulating into the transmission, although there could be a small amount picked up by the pan magnet.

Mr. Frye's Background, the Reasons the Repairs were Recommended on the Undercover Vehicles, and the Reasons Certain Employees were Replaced

31. Mr. Frye testified about his background and experience; Transmasters's usual practices when diagnosing and repairing vehicles; the reasons Transmasters recommended the repairs performed on the two undercover vehicles; and the reasons Transmasters replaced Mr. Forbes and Mr. Foster.

32. Mr. Frye has 37 years' experience working on transmissions, starting when he was 12 years old and worked at his father's transmission shop. From 1991 through 1998, he worked on transmissions for a Ford dealership; he then worked as the foreman for the El Camino Transmission shop for seven years; and he started working at Transmasters 13 years ago. After Transmasters's prior owner died of cancer, Mr. Frye purchased Transmasters, which he has since owned and operated for over 11 years. Over the years, Mr. Frye has diagnosed, repaired, and/or rebuilt over 1,000 transmissions. Mr. Frye was not aware of any disciplinary actions ever having been taken against any of his past employers as a result of his work.

33. Mr. Frye understood that the allegations were "very serious," and he pointed out that sometimes people are very upset when their cars break down. However, he has "never defrauded anyone," and he has "never purposely ripped someone off." He acknowledged that transmissions are a "mystery" to most people, including mechanics who do not work on transmissions.

34. Generally, when a consumer brings a car in, Transmasters will do an initial "basic" check, free of charge, that includes a scan, test drive, and fluid check. Then, depending on the problem, Mr. Frye, who is the "transmissions guy" at the shop, may recommend a "pan check," to get a better idea of the problem. If he cannot determine the problem from pulling the pan, Mr. Frye will recommend a tear down inspection, during which the transmission will be taken out of the vehicle, taken apart, and inspected. When

diagnosing the problem and recommending repairs, Mr. Frye will take into account the age, mileage, and condition of the vehicle, and he will also look at the parts to see if there is wear and tear.

35. Mr. Frye explained that he is, and was during the undercover runs, the “transmission guy” at Transmasters. The other technicians perform the scans and check fluids. Mr. Frye currently has a “newer guy” in training; as he has gotten away from hiring “older guys” because they can have bad habits and he can more easily train the “younger guys” the way he likes things to be done. Mr. Frye denied training any Transmasters’s employees to “upsell.” The employees were trained to check the car, get information from the customer about the baseline type of care the car had received, and communicate recommendations to the customer. According to Mr. Frye, a huge part of evaluating problems with a car is getting information from the owner about what happened and about maintenance.

36. Randy Forbes, who was working at Transmasters at the time of the July 2015 undercover run, had lots of experience before Transmasters hired him. However, Mr. Frye described Mr. Forbes’s past experience as his “down fall.” Transmasters received a lot of customer complaints regarding Mr. Forbes, Mr. Frye talked to him, but Mr. Forbes did not change his ways. Mr. Forbes “just couldn’t follow the rules.” Mr. Forbes worked for Transmasters for about two years, and when he stopped working there in 2015, the decision was “mutual.” Transmasters then hired Mr. Foster to replace Mr. Forbes, and Mr. Foster worked at Transmasters when the second January 2016 run was conducted. Mr. Frye gave Mr. Foster more training because he had “no real experience.” Mr. Frye described Mr. Foster as having a “way to get people upset” due to the manner in which he dealt with people; he was “short” with people and would respond with “attitude.” Mr. Frye talked to Mr. Foster several times, but his attitude got worse, and Transmasters had to let him go.

37. Mr. Frye did not remember the undercover operators involved with the undercover runs, although he might have been in and out of the office when Mr. Forbes and Mr. Foster spoke to them. He performed the inspections and repairs on both vehicles, and he maintained documents showing what he noted when he inspected each vehicle.

THE MONTE CARLO

38. Mr. Frye testified that his sheet for the Monte Carlo indicated the car would not go in reverse, the fluid was okay, and because it would not move, there was no test drive. The oil pump drive shaft was bad, the mileage was high, and there was metal contamination. Although he could not see inside the torque converter, given that the splines appeared grounded down on the oil pump drive shaft, the metal could have gone through the entire unit and he believed there was metal in the transmission. Mr. Frye stated that based on the information he had about the metal contamination, he “100 percent” would have recommended replacing the torque converter. He also recommended replacing the solenoids because they are magnetic and would have been slowly pulling metal into them and, because of the age of the vehicle, he could not say how long the solenoids would last. Mr. Frye

would have recommended replacing the solenoids to save the customer "headaches" in the future, and because if the solenoids went bad, it would take the entire unit down, and the transmission would need to be pulled out of the vehicle again to replace them in the future.

39. Mr. Frye decided not to replace eight to 10 of the gaskets, seals, and O-rings on the Monte Carlo because he did not think the replacement parts included in the compliance kit were "up to snuff."

40. Mr. Frye explained that Transmasters recommended that the reverse bands be replaced because of the metal contamination; the sprag set and roller clutch be replaced because of the mileage and metal that likely cycled through the transmission; the channel plate sleeve be replaced because of the stripped out oil pump drive shaft, which would have wobbled and damaged the channel plate sleeve; the internal mode switch be replaced because of the metal contamination; and the shaft recalibration kit be installed due to the mileage on the vehicle in order to avoid cross-leaks and slippage.

41. Mr. Frye did not believe the torque converter he installed on the Monte Carlo had excessive end play. He explained that Transmasters buys torque converters from a reputable company, and Transmasters did not have the device to check the end play. Mr. Frye also did not believe he damaged the second clutch apply ring and release spring because if he had damaged it, he "would have replaced it."

THE TAHOE

42. Regarding the Tahoe, Mr. Frye stated that it had 180,000 miles and the sun shell needed to be replaced. He knew the vehicle had been driven after it was damaged because the undercover operative drove it to Transmasters when it did not have second or fourth gear and it did not go in reverse. Driving the car could have caused damage and shed more metal into the transmission. Based on the mileage and broken sun shell, Mr. Frye recommended the repair work that was done on the vehicle. The rebuilt torque converter was recommended based on the mileage; the shaft kit and recalibration kit were recommended to avoid cross-leaks; replacing the sprag set was recommended based on the mileage and wear; replacement of the bearing kits was recommended due to the vehicle's mileage and because "when it goes bad it causes a lot of damage"; and replacing the solenoids was recommended because "the solenoids were going to fail" due to the metal or metal sheds. The replacement of the neutral safety switch was a common repair because it can be damaged. Mr. Frye doubted that the neutral switch was repaired without authorization due to where that charge appeared on the invoice.

EXAMPLE OF PROBLEMS CONSUMERS CAN HAVE WHEN RECOMMENDED REPAIRS ARE DECLINED

43. Mr. Frye explained that sometimes a customer will decline recommended repairs, only to bring the car in later for the repairs that had been recommended but declined. After the undercover runs, the bureau investigated a customer complaint which Transmasters

offered as an example of the problems a consumer may have if he or she declines recommended solenoid replacement. In that situation, Transmasters rebuilt the customer's transmission and recommended that the solenoids be replaced while the transmission was out of the vehicle for the rebuild. The solenoids Transmasters could test on that vehicle were okay, the customer declined the solenoid replacement recommendation, and Transmasters did not warrant the electronic parts. Six months and 7,000 miles later, the transmission was not shifting. Transmasters checked the vehicle and found a bad solenoid and again recommended replacing the solenoids. After the bureau looked into the situation, it did not take any action against Transmasters.

Changes Transmasters Has Made Since the Accusation Was Filed

44. Since the accusation was filed, Transmasters has taken corrective measures, including updating its warranty program and training its employees. Mr. Frye; Curtis Milby, Transmasters's current manager; and Oscar Gomez, a bureau certified trainer, testified about the changes.

PRACTICES REGARDING CHANGING SEALS, GASKETS, AND O-RINGS

45. Mr. Frye did not think Transmasters or he did anything wrong when repairing the undercover vehicles, other than failing to replace the seals, gaskets, and O-rings. Before the accusation was filed, Mr. Frye would re-use some of the originally installed seals, gaskets, and O-rings when he did a rebuild. He would use California compliance kits, when they were available, which included replacement seals, gaskets, and O-rings. But some of the replacements were "paper," which he did not think were of as high quality as the original parts. So, if the original seals, gaskets, and/or O-rings looked okay, he would not replace them. He would instead use whichever parts he thought was "better," which sometimes meant leaving originally installed seals, gaskets, and/or O-rings in place. He now offers consumers OEM gaskets and seals at an additional cost and explains the options, so the consumers can decide. If a customer does not want to pay more, he will use the seals, gaskets, and O-rings that are in the compliance kit.

PRACTICE REGARDING "SUPPLIES CHARGE"

46. The \$10 "Supplies Charge" on the invoices used to be generated automatically by the computer system and included a charge for chemicals and lubricants used for a rebuild. Transmasters now individually charges for those items because the bureau said that each specific item must be charged separately.

THE NEW "TRANSMASTERS WARRANTY" DOCUMENT

47. Transmasters implemented a new warranty program in 2018, which includes varying warranty levels depending on the service a customer chooses. As part of this new program, Transmasters developed a new document that is given to customers titled, "Transmasters Warranty." That document provides:

There are several levels of repair and warranty to ensure the maximum lifetime of your transmission. We don't want you to have to come back and fix a problem we recommended and have to pay additional labor charges for diagnosis or repairs.

We make specific recommendations for repairs on transmissions to avoid future issues. We make these recommendations based on vehicle age, mileage, diagnosed problem, or our experience to save you money in the long run. Some of these repairs are optional and at your discretion.

Bronze Level:

No Warranty implied or expressed. Repaired transmission per customers [*sic*] request. This is the most minimum repair we offer. Failing to perform a complete rebuild or replace parts or components we recommend may result in transmission failure, i.e., fixing the current problem but not fixing the cause of said problem. This transmission is not considered rebuilt under California Code of Regulations regarding transmission rebuilding.

Silver Level:

6 Month / 6,000 Mile Limited Warranty on transmission parts. This is a limited warranty on parts only. This does not include any warranty for labor. This transmission is not considered rebuilt under California Code of Regulations regarding transmission rebuilding.

Gold Level:

Your Transmasters Rebuilt Transmission comes with a 12 Month, or 12,000-mile Warranty whichever occurs first. Customer advised that there is NO WARRANTY on transmission / transaxle electronics - unless replaced at time of repair. All electronic components not replaced were tested during the inspection / repair process and found to be operating within normal parameters at time of delivery. This transmission will be considered rebuilt under California Code of Regulations regarding transmission rebuilding.

Platinum Level:

Your Transmasters Rebuilt Transmission comes with a 24 month / 24,000-mile Warranty - whichever occurs first. This repair would include replacement of all internal electronics. This transmission will be considered rebuilt under California Code of Regulations regarding transmission rebuilding.

TRAINING

48. The Monday before the hearing, Transmasters's employees, including Mr. Frye, participated in a training conducted by Oscar Gomez, an automotive technician and instructor. Mr. Gomez has been a Certified Smog Instructor for the State of California for six years. He is also licensed by the bureau as a smog check and smog repair technician and as a lamp and brake adjuster. He is an ASE Master Automotive Technician. Mr. Gomez has testified as an expert approximately 15 times; almost always in bureau cases and mostly in respondents' attorney's cases.

49. Mr. Gomez testified at this hearing about the training he provided to Transmasters's employees. He acknowledged that his specialty is training smog check and smog repair technicians, and he has "very little experience" regarding transmissions. The training at Transmasters was the first time Mr. Gomez ever provided training for a transmission shop crew.

50. Transmasters's attorney asked Mr. Gomez to provide a "Write it Right" training to Transmasters's employees and to include California Code of Regulations, title 16, section 3361.1, regarding transmission rebuilds as part of the training. The training lasted approximately two hours and was attended by three people, including Transmasters's current manager, Curtis Milby, and Mr. Frye. The employees asked questions, and they all seemed "highly energized." Mr. Gomez prepared a PowerPoint presentation for the training, which covered "Written Estimate/Work Order Requirements"; how to obtain a customer's authorization for work in a variety of circumstances; "Documentation Requirements"; "Additional Authorization"; "Final Invoice"; "Tear Down Requirements"; "Automatic Transmission Repair Minimum Requirements CCR § 3361.1(a)"; "Informing the Customer CCR § 3361.1 (a)"; and inspection and service of the torque converter pursuant to California Code of Regulations, title 16, section 3361.1, subdivision (d).

51. Mr. Gomez supplied Transmasters's employees with a copy of an article published in the March 2005 issue of *Gears*, titled "Defining a Quality Rebuilt Torque Converter." Mr. Gomez explained that during the training session with Transmasters, he discussed the need to test a new torque converter, which is usually supplied by a third party. However, he did go over how to test a torque converter during the training because the equipment necessary for such a test was not available.

TRANSMASTERS'S NEW MANAGER

52. Curtis Milby has worked for five and one-half years for Transmasters, and he became Transmasters's new manager in early 2018. Before being promoted to his current position, Mr. Milby was "just a mechanic" doing "regular stuff," and "nothing transmission related." He did not know anything about transmissions until he worked at Transmasters. Mr. Frye is Mr. Milby's supervisor. Mr. Milby's current duties include supervising two mechanics, talking to and taking care of customers, helping everyone in the shop, and

opening and closing. Mr. Milby talks to customers about transmission repairs, including obtaining authorization for repairs, and Mr. Frye “does it too.”

53. Mr. Milby has never told customers that something bad will happen in order to convince them to authorize “elective” repairs. Sometimes consumers will decline recommended repairs. His job is “just to try to help people.” He has never done anything inappropriate, oversold, or lied to a customer. Mr. Milby described Transmasters as having “awesome business practices,” and he would not want to work for anyone else. If he has questions about anything, he asks Mr. Frye.

Cost Recovery

54. Complainant sought cost recovery totaling \$38,509.04, which included investigation costs of \$29,161.54 and enforcement costs of \$9,347.50.

55. Complainant submitted a certification from William D. Thomas, a bureau Program Manager II, Enforcement Operations Branch, with an attached document titled “Investigative and Other Costs” regarding costs of \$12,749.17, which included:

- \$3,049.65 for 40.5 hours worked by an unidentified “Program Manager II” during the 2015/2016 fiscal year, without any indication of the specific tasks performed.
- \$1,062.59 for 13.5 hours worked by an unidentified “Program Manager II” during the 2016/2017 fiscal year, without any indication of the specific tasks performed.
- \$800 for four “hours” of “operator fees” at the rate of \$200 per “day.”
- \$7,836.93 for “evidence purchase,” without any receipts or other evidence provided regarding what was included in this amount.

Mr. Thomas’s certification did not meet the requirements of California Code of Regulations, title 1, section 1042, subdivision (b)(1), which requires that the declaration “describe the general tasks performed, the time spent on each task and the method of calculating the cost. For other costs, the bill, invoice or similar supporting document shall be attached to the Declaration.” Although the method of calculation was included on the attachment to the certification, there was no specific program manager identified,¹⁰ and there was no description of the tasks performed or the time spent on each task. The requested operator fees did not make sense, as four hours of time was requested at the rate of \$200 per day, and there was no invoice or other evidence to prove the amount of time the operatives

¹⁰ Although Mr. McKee worked on the undercover operation, his title is “Program Representative II” and there were no witnesses who held the “Program Manager II” title.

worked.¹¹ Additionally, there was no evidence to support the request for “evidence purchase.” Accordingly, the costs requested by Mr. Thomas’s certification are not recoverable because the certification and attachments do not comply with the regulatory requirements.

56. Complainant submitted another certification from Wayne Ramos, a bureau Program Manager II, Forensic Documentation Program, with an attached document titled “Investigative and Other Costs” regarding costs incurred of \$16,412.37. Also attached to the certification was a “Documentation Hours and Cost Spreadsheet” for work performed by Mr. Giese totaling \$3,466.75 for 45.5 hours of his time in 2015 spent on documentation (5 hours), declaration (12 hours), post run inspection (20.75 hours), “Post Phase II” (2.75 hours) and court preparation (5 hours); and a “Documentation Hours and Cost Spreadsheet” for work performed by Mr. Losee totaling \$12,945.62 for 183.5 hours of his time in 2016 spent on documentation (126.5 hours), declaration (13 hours), post run inspection (37 hours), and court preparation (7 hours).

The certification signed by Mr. Ramos complied with California Code of Regulations, title 1, section 1042, subdivision (b)(1), as it provided an adequate description of the tasks performed to prove the investigation costs sought. However, it does not make sense that the investigation costs for the first (2015) undercover run would be \$3,466.75, and the investigation costs for the second (2016) undercover run would be \$12,945.62, which is 3.7 times more. Accordingly, the reasonable investigation costs were \$6,933.50, after reducing the costs for the second undercover operation to be consistent with the costs incurred for the first undercover operation.

57. Complainant sought recovery of enforcement costs totaling \$9,347.50. The Deputy Attorney General who prosecuted the case provided a declaration signed on October 16, 2018. Attached to his declaration was a document entitled “Master Time Activity by Professional Type” that identified the tasks performed, the time spent on each task, the persons who performed each task, and the hourly rates charged. The request for prosecution costs complied with the requirements of California Code of Regulations, title 1, section 1042, subdivision (b)(2), to prove the prosecution costs sought. Accordingly, the reasonable enforcement costs were \$9,347.50.

58. Mr. Frye has no business or source of income other than Transmasters. He is married, and his wife does not work. They have three daughters, ages 28, 25, and 21, and they continue to provide their children with financial support. Mr. Frye could make payments to reimburse the bureau’s investigation and prosecution costs, even though he does not think it would be fair.

¹¹ Although the operatives testified that they were paid \$200 per day, there was no evidence presented regarding how many days they worked.

LEGAL CONCLUSIONS

Purpose of Disciplinary Proceedings

1. The main purpose of administrative disciplinary proceedings is to protect the public through the prevention of future harm and the improvement and rehabilitation of the licensee. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856; See *Imports Performance v. Department of Consumer Affairs, Bureau of Automotive Repair* (2011) 201 Cal.App.4th 911, 919.)

2. “Protection of the public shall be the highest priority for the Bureau of Automotive Repair in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.” (Bus. & Prof. Code, § 9880.3.)

Burden and Standard of Proof

3. Complainant bears the burden of proof of establishing that the charges in the accusation are true. (*Martin v. State Personnel Board* (1972) 26 Cal.App.3d 573, 583.)

4. The standard of proof in a proceeding to discipline an automotive repair dealer registration is the preponderance of the evidence. (*Imports Performance v. Department of Consumer Affairs, Bureau of Automotive Repair* (2011) 201 Cal.App.4th 911, 916-918; Evid. Code, § 115.)

5. “‘Preponderance of the evidence means evidence that has more convincing force than that opposed to it.’ [Citations.]” (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325.) “The sole focus of the legal definition of ‘preponderance’ in the phrase ‘preponderance of the evidence’ is on the *quality* of the evidence. The *quantity* of the evidence presented by each side is irrelevant.” (*Ibid.*, italics in original.) “If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it [citation].” (*People v. Mabini* (2001) 92 Cal.App.4th 654, 663.)

6. In a disciplinary proceeding, the burden of proof is on respondent to produce positive evidence of rehabilitation. (*Epstein v. California Horse Racing Board* (1963) 222 Cal.App.2d 831, 842-843.)

Relevant Statutory Disciplinary Authority

7. Automotive repair dealers are governed by the Automotive Repair Act. (Bus. & Prof. Code, §§ 9800, et seq.) An “Automotive repair dealer” is a “person who, for compensation, engages in the business of repairing or diagnosing malfunctions of motor vehicles.” (Bus. & Prof. Code, § 9800.1, subd. (a).)

8. The bureau may discipline an ARD registration on the grounds set forth in Business and Professions Code section 9884.7, subdivision (a), which states:

(a) The director, where the automotive repair dealer cannot show there was a bona fide error, may deny, suspend, revoke, or place on probation the registration of an automotive repair dealer for any of the following acts or omissions related to the conduct of the business of the automotive repair dealer, which are done by the automotive repair dealer or any automotive technician, employee, partner, officer, or member of the automotive repair dealer.

(1) Making or authorizing in any manner or by any means whatever any statement written or oral which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading.

[¶] . . . [¶]

(4) Any other conduct that constitutes fraud.

[¶] . . . [¶]

(6) Failure in any material respect to comply with the provisions of this chapter or regulations adopted pursuant to it.

(7) Any willful departure from or disregard of accepted trade standards for good and workmanlike repair in any material respect, which is prejudicial to another without consent of the owner or his or her duly authorized representative.

9. Business and Professions Code section 9884.8 provides:

All work done by an automotive repair dealer, including all warranty work, shall be recorded on an invoice and shall describe all service work done and parts supplied. Service work and parts shall be listed separately on the invoice, which shall also state separately the subtotal prices for service work and for parts, not including sales tax, and shall state separately the sales tax, if any, applicable to each. If any used, rebuilt, or reconditioned parts are supplied, the invoice shall clearly state that fact. If a part of a component system is composed of new and used, rebuilt or reconditioned parts, that invoice shall clearly state that fact. The invoice shall include a statement indicating whether any crash parts are original equipment

Nothing in this section shall be construed as requiring an automotive repair dealer to give a written estimated price if the dealer does not agree to perform the requested repair.

(b) The automotive repair dealer shall include with the written estimated price a statement of any automotive repair service that, if required to be done, will be done by someone other than the dealer or his or her employees. No service shall be done by other than the dealer or his or her employees without the consent of the customer, unless the customer cannot reasonably be notified. The dealer shall be responsible, in any case, for any service in the same manner as if the dealer or his or her employees had done the service.

Regulatory Authority

11. California Code of Regulations, title 16, section 3353, requires that a written estimate be provided to and authorized by the customer before any work commences. The version of section 3353 quoted in the accusation went into effect on May 17, 2006. Since then, section 3353 has undergone substantial revisions, operative September 13, 2018, although the current operative version still requires a written estimate and customer authorization before commencing work.¹²

12. California Code of Regulations, title 16, section 3356, operative September 13, 2018, concerns invoice requirements, and it currently provides¹³:

(a) All invoices for service and repair work performed, and parts supplied, as provided for in Section 9884.8 of the Business and Professions Code, shall comply with this section.

(b)¹⁴ The invoice shall show the automotive repair dealer's registration number and the corresponding business name and address as shown in the Bureau's records.

¹² In the September 2018 version, subdivision (a) has been reworded; subdivision (c) currently concerns a "Teardown" estimate as compared to the version quoted in the accusation which discussed "Additional Authorization"; and the version cited in the accusation included a subdivision (g), defining "written," "oral," and "electronic," but neither subdivision (g) nor any definitions appear in the currently operative version of section 3353.

¹³ The version of section 3356 quoted in the accusation appears to be the version enacted operative March 4, 2007. In the current version, some of the provisions were re-numbered and re-lettered when compared to the language quoted in the accusation.

(c) The invoice shall separately list, describe and identify all of the following:

(1) All services and repairs performed, including any diagnosis or warranty repairs, and the prices for each.

(2) Each part supplied, in such a manner that the customer can understand what was purchased, and the price for each described part. The description of each part shall state whether the part was new, used, reconditioned, rebuilt, an OEM crash part, or a non-OEM aftermarket crash part. Part kits containing several components may be listed as a single part on the invoice and identified by brand name and corresponding part number or similar designation.

(3) The subtotal price for all service and repair work performed.

(4) The subtotal price for all parts supplied, not including sales tax.

(5) The applicable sales tax, if any.

(6) The total cost for all service and repair work, parts supplied and applicable sales tax.

[¶] ... [¶]

(f) If a customer is to be charged for a part, that part shall be specifically listed as an item in the invoice, as provided in paragraph (2) of subsection (b) above. If that item is not listed in the invoice, it shall not be regarded as a part, and a separate charge may not be made for it.¹⁵

(g) Separate billing in an invoice for items generically noted as shop supplies, miscellaneous parts, fees for electronic

¹⁴ Subdivisions (b) and (c) of the current version of section 3356 contain similar provisions, with some revisions not pertinent here, as appeared in former section 3356, subdivision (a)(1) through (a)(2)(E).

¹⁵ The current version of section 3356, subdivision (f), contains the same provision, with some minor rewording, that was quoted in the accusation as appearing in section 3356, subdivision (b).

communication with the smog check database, and the like, is prohibited.¹⁶

[¶] ... [¶]

(j) The automotive repair dealer shall give the customer a legible copy of the invoice.¹⁷

13. California Code of Regulations, title 16, section 3361.1, provides the following regarding the repair, sale, and/or installation of automatic transmissions:

The following minimum requirements specifying accepted trade standards for good and workmanlike rebuilding of automatic transmissions are intended to define terms that have caused confusion to the public and unfair competition within the automotive repair industry. The term "automatic transmission" shall also apply to the automatic transmission portion of transaxles for the purposes of this regulation, unless both the automatic transmission portion and the differential portion of the transaxle share a common oil supply, in which case the term "automatic transmission" shall apply to both portions of the transaxle. These minimum requirements shall not be used to promote the sale of "rebuilt" automatic transmissions when a less extensive and/or less costly repair is desired by the customer. Any automotive repair dealer who represents to customers that the following sections require the rebuilding of automatic transmissions is subject to the sanctions prescribed by the Automotive Repair Act. All automotive repair dealers engaged in the repair, sale, or installation of automatic transmissions in vehicles covered under the Act shall be subject to the following minimum requirements:

(a) Before an automatic transmission is removed from a motor vehicle for purposes of repair or rebuilding, it shall be inspected.

¹⁶ Currently, section 3356, subdivision (g), prohibits charging for "shop supplies." The former version of section 3356, subdivision (c), which is quoted in the accusation, prohibited charging for shop supplies as follows: "(c) Separate billing in an invoice for items generically noted as shop supplies, miscellaneous parts, or the like, is prohibited."

¹⁷ The accusation quoted former section 3356, subdivision (d), as stating, "(d) the automotive repair dealer shall give the customer a legible copy of the invoice and shall retain a legible copy as part of the automotive repair dealer's records pursuant to Section 9884.11 of the Business and Professions Code and Section 3358 of this article.

Such inspection shall determine whether or not the replacement or adjustment of any external part or parts will correct the specific malfunction of the automatic transmission. In the case of an electronically controlled automatic transmission, this inspection shall include a diagnostic check, including the retrieval of any diagnostic trouble codes, of the electronic control module that controls the operation of the transmission. If minor service and/or replacement or adjustment of any external part or parts and/or of companion units can reasonably be expected to correct the specific malfunction of the automatic transmission, then prior to removal of the automatic transmission from the vehicle, the customer shall be informed of that fact as required by Section 3353 of these regulations. Before removing an automatic transmission from a motor vehicle, the dealer shall also comply with the provisions of section 3353(d), and disclose any applicable guarantee or warranty as provided in sections 3375, 3376 and 3377 of these regulations. If a diagnostic check of an electronic control module cannot be completed due to the condition of the transmission, the customer shall be informed of that fact and a notation shall be made on the estimate, in accordance with Section 3353 of these regulations.

(b) When the word "exchanged" is used to describe an automatic transmission, it shall mean that the automatic transmission is not the customer's unit that was removed from the customer's vehicle. Whenever the word "exchanged" is used to describe an automatic transmission, it shall be accompanied by a word or descriptive term such as "new," "used," rebuilt," "remanufactured," "reconditioned," or "overhauled," or by an expression of like meaning.

(c) Any automotive repair dealer that advertises or performs, directly or through a sublet contractor, automatic transmission work and uses the words "exchanged," "rebuilt," "remanufactured," "reconditioned," or "overhauled," or any expression of like meaning, to describe an automatic transmission in any form of advertising or on a written estimate or invoice shall only do so when all of the following work has been done since the transmission was last used:

(1) All internal and external parts, including case and housing, have been thoroughly cleaned and inspected.

- (2) The valve body has been disassembled and thoroughly cleaned and inspected unless otherwise specified by the manufacturer.
- (3) All bands have been replaced with new or relined bands.
- (4) All the following parts have been replaced with new parts:
 - (A) Lined friction plates
 - (B) Internal and external seals including seals that are bonded to metal parts
 - (C) All sealing rings
 - (D) Gaskets
 - (E) Organic media disposable type filters (if the transmission is so equipped)
- (5) All impaired, defective, or substantially worn parts not mentioned above have been restored to a sound condition or replaced with new, rebuilt, or unimpaired parts. All measuring and adjusting of such parts has been performed as necessary.
- (6) The transmission's electronic components, if so equipped, have been inspected and found to be functioning properly or have been replaced with new, rebuilt, or unimpaired components that function properly.
- (7) The torque converter has been inspected and serviced in accordance with subsection (d) of this regulation.
 - (d) The torque converter is considered to be part of the automatic transmission and shall be examined, cleaned, and made serviceable before the rebuilt, remanufactured or overhauled transmission is installed. If the torque converter cannot be restored to a serviceable condition, then the customer shall be so informed. With the customer's authorization, the converter shall be replaced with a new, rebuilt, remanufactured, reconditioned, overhauled, or unimpaired used torque converter. A torque converter shall not be represented as rebuilt, remanufactured, reconditioned, or overhauled unless the torque converter shell has been opened, all components of the overrunning clutch assembly have been inspected and replaced

as required, all friction materials have been replaced as required, all rotating parts have been examined and replaced as required, the shell has been resealed, and the unit has been pressure tested.

14. California Code of Regulations, title 16, section 3371,¹⁸ currently states that “[n]o automotive repair dealer shall publish, utter, or make or cause to be published, uttered, or made any false or misleading statement or advertisement which is known to be false or misleading, or which by the exercise of reasonable care should be known to be false or misleading. . . .”

15. California Code of Regulations, title 16, section 3373, provides:

No automotive repair dealer or individual in charge shall, in filling out an estimate, invoice, or work order, or record required to be maintained by section 3340.15(e) of this chapter, withhold therefrom or insert therein any statement or information which will cause any such document to be false or misleading, or where the tendency or effect thereby would be to mislead or deceive customers, prospective customers, or the public.

Authority Regarding Fraud

17. In this matter, complainant argued that although Transmasters did not engage in intentional fraud, complainant did not need to prove intent to establish fraud because Transmasters engaged in “constructive fraud,” which does not require intent, citing Civil Code sections 1571, 1572, and 1573.

18. The law is well established that fraud may be either actual or constructive. (Civ. Code, § 1571.) “Actual fraud” requires “intent to deceive.” (Civ. Code, § 1572.) Intent is not required to prove “constructive fraud,” which is defined by Civil Code section 1573 as follows:

1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or,
2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud.

¹⁸ This regulation was also amended operative September 13, 2018. The previous version went into effect in March 1983. The accusation quoted section 3371 as stating, “[n]o dealer,” whereas the current version says “[n]o automotive repair dealer.”

19. California case law has interpreted Civil Code section 1573 as requiring a fiduciary or confidential relationship between the parties to support a finding of constructive fraud. (*Tyler v. Children's Home Society* (1994) 29 Cal.App.4th 511, 547-548.) In the *Tyler* case, the appellate court addressed whether negligent omissions by an adoption agency to comply with regulations may constitute constructive fraud, noting the well-established law that "[c]onstructive fraud arises on a breach of duty by one in a confidential or fiduciary relationship to another which induces justifiable reliance by the latter to his prejudice." (*Ibid.*, citing Civ. Code, § 1573 and quoting *Odorizzi v. Bloomfield School District* (1966) 246 Cal.App.2d 123, 129 (italics in original).) The *Tyler* court explained (*Tyler, supra*, 171 Cal.App.4th at 547):

However, a relationship need not be a fiduciary one in order to give rise to constructive fraud. Constructive fraud also applies to nonfiduciary "confidential relationships." (*Odorizzi v. Bloomfield School Dist., supra*, 246 Cal.App.2d at p. 129.) "Such a confidential relationship may exist whenever a person with justification places trust and confidence in the integrity and fidelity of another." (*Ibid.*, [bare allegation of employer-employee relationship insufficient to support confidential relationship].) "A confidential relation exists between two persons when one has gained the confidence of the other and purports to act or advise with the other's interest in mind. A confidential relation may exist although there is no fiduciary relation" (*Davies v. Krasna* (1975) 14 Cal.3d 502, 510 [parallel citations omitted] [dictum].)

20. "There is no absolute or fixed rule for determining what facts will constitute fraud; whether or not it is found depends upon the particular facts of the case under inquiry. Fraud may be proved by direct evidence or it may be inferred from all of the circumstances in the case." (*Ach v. Finkelstein* (1968) 264 Cal.App.2d 667, 674-675.) For example, in an appeal from the decision issued in an administrative proceeding regarding a private investigator's license, the appellate court explained "[f]raud embraces multifarious means whereby one person gains an advantage over another and means in effect bad faith, dishonesty or overreaching. . . . 'It is a generic term which embraces all the multifarious means which human ingenuity can devise and are resorted to by one individual to get an advantage over another. No definite and invariable rule can be laid down as a general proposition defining fraud, as it includes all surprise, trick, cunning, dissembling and unfair ways by which another is cheated.' [Citations.]" (*Wayne v. Bureau of Private Investigators and Adjusters, Department of Professional and Vocational Standards* (1962) 201 Cal.App.2d 427, 437-438.)

Responsibility for Conduct of Employees

21. The law is well established that a licensee who elects to operate its business through employees is responsible to the licensing authority for the conduct of its employees.

(Ford Dealers Assn. v. Department of Motor Vehicles (1982) 32 Cal3d 347, 360; *Kirby v. Alcoholic Bev. Etc. Appeals Bd.* (1973) 33 Cal.App.3d 732, 737.) This rule is consistent with the law governing principal-agent liability contained in Civil Code section 2330 that “[a]n agent represents his principal for all purposes within the scope of his actual or ostensible authority. . . .” It is also consistent with the doctrine of respondeat superior codified in Civil Code section 2338, which provides that “a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business. . . .”

Evaluation of Cause to Discipline the ARD Registration

22. Complainant proved by a preponderance of the evidence that Transmasters made untrue and misleading statements by charging to rebuild the Monte Carlo’s and Tahoe’s transmissions without performing all the work to rebuild transmission as required by California Code of Regulations, title 16, section 3361.1, because Transmasters failed to replace 12 seals and three gaskets when rebuilding the Monte Carlo’s transmission and failed to replace eight to nine seals when rebuilding the Tahoe’s transmission.

23. The evidence did not support a finding that the relationships between Transmasters and the two undercover operatives posing as consumers amounted to either “fiduciary” or “confidential” relationships that might support a finding of constructive fraud, without intent, under Civil Code section 1573 as argued by complainant’s counsel. Nor did the evidence support a finding of intentional fraud.

24. With respect to Transmasters’s failure to replace all the seals and gaskets, complainant did not prove by a preponderance of the evidence that Transmasters’s conduct was fraudulent. Mr. Frye credibly testified that he did not replace all the seals and gaskets on the transmissions due to his belief that he was acting in the best interest of the consumer because he thought the original seals and gaskets left in place were superior to the replacement seals and gaskets. Therefore, the evidence did not support a finding that Transmasters’s decision to leave some seals and gaskets in place, even though Transmasters did not notify the undercover operatives those seals and gaskets were not replaced and then charged for the entire replacement kit, amounted to intentional fraud.

25. With respect to Transmasters’s recommendation to rebuild the Monte Carlo’s transmission and replace parts other than the oil pump drive shaft, filter, and some fluids, complainant did not prove by a preponderance of the evidence that Transmasters’s repair recommendations were untrue, misleading, or fraudulent. Given the mileage on the vehicle and the evidence of metal contamination as a result of the induced defect in the oil pump drive shaft, by shearing the splines off one end, Transmasters’s concern that the transmission was contaminated by metal particles was reasonable and Transmasters’s recommended rebuild was not untrue, misleading, or fraudulent. Mr. Frye credibly testified about his concern that the electronics and other parts may have been damaged by metal contamination in light of the damaged oil pump drive shaft, which under real life circumstances would have resulted from shearing of metal from the splines over time. The undercover operative was

told by Transmasters about the metal contamination concern, and there was no evidence to suggest that the manner in which that information was conveyed to her was misleading. Mr. Giese provided equally credible testimony that the solenoids and other parts did not need to be replaced as part of the transmission rebuild. However, although Mr. Giese was aware of how the malfunction was induced and confident that the transmission had not been contaminated by metal particles, that was not something Transmasters could have known under the circumstances. The evidence was so evenly balanced regarding which parts should have reasonably been recommended replaced on the Monte Carlo that the issue of whether the recommended repairs were untrue, misleading, or fraudulent must be decided against complainant, who had the burden of proof. (*Mabini, supra*, 92 Cal.App.4th at 663.)

26. With respect to Transmasters's recommendation to rebuild the transmission and replace parts other than the reaction sun shell on the Tahoe, complainant did not prove by a preponderance of the evidence that Transmasters's repair recommendations were untrue, misleading, or fraudulent. Given the mileage on the vehicle and the condition of the vehicle, which was driven to Transmasters's shop without having second, fourth, or reverse gears, Transmasters's recommended rebuild was not untrue, misleading, or fraudulent. Mr. Frye credibly testified about his determination that given the fact that the reaction sun shell was broken, the age and mileage of the vehicle, the fact that the Tahoe had no second, fourth, or reverse gears, and the fact that the undercover operative had driven the Tahoe in that condition, a rebuild was the appropriate recommendation. There was no evidence to suggest that the manner in which the recommendation was communicated to the undercover operative was misleading. Mr. Losee provided equally credible testimony that the solenoids and other parts did not need to be replaced as part of the transmission rebuild. The evidence was so evenly balanced regarding which parts should have reasonably been recommended replaced on the Tahoe that the issue of whether the recommended repairs were untrue, misleading, or fraudulent must be decided against complainant, who had the burden of proof. (*People v. Mabini* (2001) 92 Cal.App.4th 654, 663.)

27. Complainant proved by a preponderance of the evidence that Transmasters failed to meet the minimum standards required and failed to follow accepted trade standards when it repaired the Monte Carlo because the torque converter Transmasters installed in the Monte Carlo had excessive end play, the second clutch apply ring and release spring were impaired, the input clutch slipped, and two wiring retainers were missing. Although Mr. Frye testified to his confidence that he did not damage any parts; Mr. Giese's testimony, which was supported by his detailed documentation and photographs he took during his post undercover run inspection, was given greater weight regarding the condition of the vehicle after Transmasters completed the repair work.

28. Complainant failed to prove by a preponderance of the evidence that Transmasters failed to meet the minimum standards required and failed to follow accepted trade standards with respect to the Tahoe repairs, as Mr. Losee did not criticize the quality of the repair work that Transmasters performed.

29. Complainant proved by a preponderance of the evidence that each of the Transmasters's invoices for the work on the Monte Carlo and Tahoe included an impermissible "Supplies Charge."

30. Complainant proved by a preponderance of the evidence that Transmasters charged for the replacement of a neutral safety switch on the Tahoe without authorization. Transmasters's arguments that the charge would have appeared in a different location on the invoice if that charge had not been authorized was speculative and unpersuasive.

31. Complainant did not prove that Transmasters failed to have the undercover operatives sign the invoices. The evidence established that each of the undercover operatives signed the copy of the invoice retained by Transmasters, and Transmasters provided each of them with a legible copy of the invoice.

32. First Cause for Discipline. Because Transmasters's invoice charged for seals and gaskets, as part of a master kit, that were not installed on the Monte Carlo, cause exists to discipline Transmasters pursuant to Business and Professions Code section 9884.7, subdivision (a)(1), for making untrue and misleading statements.

33. Second Cause for Discipline. Cause does not exist to discipline Transmasters pursuant to Business and Professions Code section 9884.7, subdivision (a)(4), because the evidence did not support a finding that Transmasters engaged in fraud with respect to the repairs recommended and performed on the Monte Carlo.

34. Third Cause for Discipline. Cause exists to discipline Transmasters pursuant to Business and Professions Code section 9884.7, subdivision (a)(6), because Transmasters failed to follow accepted trade standards when it repaired the Monte Carlo in violation of Business and Professions Code section 9884.7, subdivision (a)(7); and Transmasters listed an impermissible "Supplies Charge" on the invoice for the Monte Carlo repair work in violation of Business and Professions Code section 9884.8. Cause does not exist to discipline Transmasters under Business and Professions Code section 9884.9, because Transmasters obtained the undercover operative's authorization for the work performed on the Monte Carlo and had her sign the invoice, and Transmasters retained the copy signed by the operative.

35. Fourth Cause for Discipline. Cause exists to discipline Transmasters pursuant to Business and Professions Code section 9884.7, subdivision (a)(6), because Transmasters billed for shop supplies on the Monte Carlo invoice in violation of California Code of Regulations, title 16, section 3356, subdivision (c)¹⁹; failed to rebuild the transmission to meet the minimum requirements in violation of California Code of Regulations, title 16,

¹⁹ At the time of the violation, section 3356, subdivision (c), prohibited charging for shop supplies. That prohibition appears in subdivision (g) of the current version of section 3356.

section 3361.1; and made a false and misleading record in violation of California Code of Regulations, title 16, section 3371, and made knowingly false statements in violation of California Code of Regulations, title 16, section 3373, by issuing an invoice and charging for a rebuild of the Monte Carlo's transmission when Transmasters did not provide all parts required to rebuild a transmission under California law.

36. Fifth Cause for Discipline. Because Transmasters's invoice charged for seals, as part of a master kit, that were not installed on the Tahoe, cause exists to discipline Transmasters pursuant to Business and Professions Code section 9884.7, subdivision (a)(1), for making untrue and misleading statements.

37. Sixth Cause for Discipline. Cause does not exist to discipline Transmasters pursuant to Business and Professions Code section 9884.7, subdivision (a)(4), because the evidence did not support a finding that Transmasters engaged in fraud with respect to the repairs recommended and performed on the Tahoe.

38. Seventh Cause for Discipline. Cause exists to discipline Transmasters pursuant to Business and Professions Code section 9884.7, subdivision (a)(6), because Transmasters listed an impermissible "Supplies Charge" on the invoice for the Tahoe repair work in violation of Business and Professions Code section 9884.8; and Transmasters failed to obtain authorization to replace the neutral safety switch on the Tahoe in violation of Business and Professions Code section 9884.9. Cause does not exist to discipline Transmasters under Business and Professions Code section 9884.7, subdivision (a)(7), because there was no evidence that the repair work on the Tahoe failed to meet accepted trade standards.

39. Eighth Cause for Discipline. Cause exists to discipline Transmasters pursuant to Business and Professions Code section 9884.7, subdivision (a)(6), because Transmasters billed for shop supplies in violation of California Code of Regulations, title 16, section 3356, subdivision (c)²⁰; failed to rebuild the Tahoe's transmission to meet the minimum requirements in violation of California Code of Regulations, title 16, section 3361.1; made a false and misleading record in violation of California Code of Regulations, title 16, section 3371; and made knowingly false statements in violation of California Code of Regulations, title 16, section 3373.

40. The accusation also alleged in the Eighth Cause for Discipline, at page 14, paragraph 42 (a), that Transmasters "exceeded the estimated price without prior approval from the customer," in violation of California Code of Regulations, title 16, section 3356, subdivision (c). However, neither the current version of section 3356, subdivision (c), nor the old version quoted in the accusation say anything about "exceeding the estimated price." Therefore, cause does not exist to discipline Transmasters for exceeding the estimated price

²⁰ See footnote 19, above.

under the regulation cited in the accusation because that regulation did not, and does not now, contain such a prohibition.²¹

Authority Regarding Appropriate Level of Discipline

41. Under California Code of Regulations, title 16, section 3395.4:

In reaching a decision on a disciplinary action under the Administrative Procedure Act (Government Code Section 11400 et seq.), including formal hearings conducted by the Office of Administrative Hearings, the Bureau of Automotive Repair shall consider the disciplinary guidelines entitled "Guidelines for Disciplinary Orders and Terms of Probation" [Rev. March 2016] which are hereby incorporated by reference. The "Guidelines for Disciplinary Orders and Terms of Probation" are advisory. Deviation from these guidelines and orders, including the standard terms of probation, is appropriate where the Bureau of Automotive Repair in its sole discretion determines that the facts of the particular case warrant such deviation.

42. The guidelines state that factors in aggravation should be considered when determining the appropriate discipline, including: prior warnings and office conferences, history of citations or formal disciplinary action; failure to permit inspection of records; abuse of mechanic's liens; attempts to intimidate consumers; negligent or willful improper repair work that endangers a consumer; whether an unlawful act was part of a pattern or practice; failure to comply with a request for corrective action/retraining; current probation for improper acts; failure to successfully complete a prior period of probation; failure to pay a court judgment to a victim; violation of previous court order(s); and any other conduct which constitutes fraud or gross negligence.

43. The guidelines also provide that the following factors in mitigation should be considered: evidence that respondent implemented suggested resolutions of a consumer complaint or paid restitution or made corrective repair of a consumer's vehicle; voluntary participation in retraining; voluntary purchase of proper diagnostic equipment and manuals; evidence of a temporary medical condition that prevented respondent from exercising supervision and control over employees or others, which led to wrongdoing; absence of any prior discipline; absence of any loss or damage to consumers; evidence that the violation was not part of a pattern or practice; evidence that the shop owner has taken specific steps to

²¹ While Business and Professions Code section 9884.9, subdivision (a), prohibits exceeding the estimated price, the accusation's allegations did not provide respondents adequate notice to find cause to discipline them for exceeding the estimated price under that code section. (Gov. Code, § 11503, subd. (a).)

minimize recurrence; resolution of consumer complaints with a subsequent change in business practice; and substantial measures to correct business practices and/or operations to minimize likelihood of recurrence.

44. The guidelines contain recommendations for the minimum and maximum discipline. The maximum level of discipline for any violation is revocation and payment of the reasonable costs of investigation and prosecution. The guidelines list the minimum level of discipline recommended for the following violations:

- For false and misleading statements in violation of Business and Professions Code section 9884.7, subdivisions (a)(1): revocation, stayed, suspension, and three years' probation, with optional conditions 1, 2, 3b, and/or 3c.
- For failure to comply with the Automotive Repair Act or regulations in violation of Business and Professions Code section 9884.7, subdivision (a)(6): revocation, stayed, suspension, and two years' probation, with optional conditions 1, 2, 3c, and/or 7.

45. The purpose of discipline is not to punish; the purpose is to "ensure the protection of the public's health, safety, and welfare." (*Imports Performance v. Department of Consumer Affairs, Bureau of Automotive Repair* (2011) 201 Cal.App.4th 911, 919.) In the *Imports Performance* case, the bureau revoked the respondent's smog technician license, but did not revoke the respondent's automotive dealer registration where there was no finding that the respondent engaged in "dishonest, fraudulent, or deceitful acts." (*Ibid.*)

Evaluation

46. In this case, Transmasters failed to follow California Code of Regulations, title 16, section 3361.1, by not replacing all the seals and gaskets as required when performing transmission rebuilds on two undercover vehicles. Transmasters's repair of one vehicle, the Monto Carlo, was not up to standards in that the torque converter Transmasters installed had excessive endplay, the second clutch apply ring and release spring were damaged, the input clutch slipped, and two wiring harness retainers were missing. Transmasters did not test the torque converter, trusting the third party supplier. On the other vehicle, the Tahoe, Transmasters charged for the replacement of a neutral safety switch without prior authorization. On both repair invoices, Transmasters impermissibly charged for "shop supplies."

47. Transmasters did not have any prior disciplinary history. The Transmasters's employees, who communicated with the undercover operatives, no longer work for Transmasters. Mr. Frye believed those two employees had problems dealing with consumers, and as a result, they had stopped working for Transmasters even before the accusation was filed. Transmasters has since changed business practices in an effort to comply with the regulations and more clearly communicate with consumers. Transmasters's

employees also attended a training session that included instruction regarding compliance with California Code of Regulations, title 16, section 3361.1.

48. Under the facts of this case, revocation would be impermissibly punitive. The appropriate discipline is a three-year probation, with appropriate terms and conditions to afford public protection.

Recovery of Costs of Enforcement

49. Business and Professions Code section 125.3 provides in pertinent part:

(a) Except as otherwise provided by law, in any order issued in resolution of a disciplinary proceeding . . . the board may request the administrative law judge to direct a licensee found to have committed a violation . . . of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case

[¶] . . . [¶]

(d) The administrative law judge shall make a proposed finding of the amount of reasonable costs of investigation and prosecution of the case when requested pursuant to subdivision (a)

50. In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court dealt with the issue of cost recovery, under a statute similar to Business and Professions Code section 125.3, and noted that because a licensee with limited financial resources might forego a hearing for fear that a board might erroneously sustain the charges and order the licensee to reimburse costs, discretion must be used to ensure that a licensee with a meritorious claim is not deterred from exercising his or her right to a hearing. (*Id.* at p. 44.) The Court determined that five factors should be considered in determining whether a particular licensee should be ordered to pay the reasonable costs of investigation and prosecution under statutes like Business and Professions Code section 125.3: Whether the licensee has been successful at hearing in having charges dismissed or reduced, the licensee's subjective good faith belief in the merits of his or her position, whether the licensee raised a colorable challenge to the proposed discipline, the financial ability of the licensee to pay, and whether the scope of the investigation was appropriate in light of the alleged misconduct. (*Ibid.*)

51. In the present case, Transmasters raised colorable challenges to the proposed discipline and was successful in having probation imposed instead of revocation. The scope of the prosecution was reasonable in light of the serious nature of the alleged misconduct, although some of the investigation costs were not reasonable, as the investigation costs for the second undercover run were almost four times the costs requested for the first run. This

was not a case in which the agency conducted a disproportionately large prosecution to prove relatively innocuous misconduct because the conduct at issue in this proceeding was serious.

52. Taking the *Zuckerman* factors into consideration, cause exists under Business and Professions Code section 125.3 to direct Transmasters to reimburse the bureau its investigation and enforcement costs in the amount of \$7,500, which shall be payable according to a payment plan during the term of probation.

ORDER

IT IS HEREBY ORDERED that Automotive Repair Dealer Registration Number 250149; issued to C2K Enterprises, Inc., doing business as Transmasters Transmissions; Rickey Frye, Jr., President/Treasurer; and Jamie L. Kelley-Frye, Secretary, is revoked. However, the revocation is stayed, and respondents are placed on probation for three years on the following terms and conditions.

1. Obey All Laws

During the period of probation, respondents shall comply with all federal and state statutes, regulations and rules governing all Bureau of Automotive Repair (BAR) registrations and licenses held by respondents.

2. Quarterly Reporting

During the period of probation, respondents shall report either by personal appearance or in writing as determined by BAR on a schedule set by BAR, but no more frequently than once each calendar quarter, on the methods used and success achieved in maintaining compliance with the terms and conditions of probation.

3. Report Financial Interests

Respondents shall, within 30 days of the effective date of the decision and within 30 days from the date of any request by BAR during the period of probation, report any financial interest which any respondent or any partners, officers, or owners of any respondent facility may have in any other business required to be registered pursuant to Section 9884.6 of the Business and Professions Code.

4. Access to Examine Vehicles and Records

Respondents shall provide BAR representatives unrestricted access to examine all vehicles (including parts) undergoing service, inspection, or repairs, up to and including the point of completion. Respondents shall also provide BAR representatives unrestricted access to all records pursuant to BAR laws and regulations.

5. Tolling of Probation

If, during probation, respondents leave the jurisdiction of California to reside or do business elsewhere or otherwise cease to do business in the jurisdiction of California, respondents shall notify BAR in writing within 10 days of the dates of departure and return, and of the dates of cessation and resumption of business in California.

All provisions of probation other than cost reimbursement requirements, restitution requirements, training requirements, and that respondents obey all laws, shall be held in abeyance during any period of time of 30 days or more in which respondents are not residing or engaging in business within the jurisdiction of California. All provisions of probation shall recommence on the effective date of resumption of business in California. Any period of time of 30 days or more in which respondents are not residing or engaging in business within the jurisdiction of California shall not apply to the reduction of this probationary period or to any period of actual suspension not previously completed. Tolling is not available if business or work relevant to the probationary license or registration is conducted or performed during the tolling period.

6. Violation of Probation

If respondents violate or fail to comply with the terms and conditions of probation in any respect, the Director, after giving notice and opportunity to be heard, may set aside the stay order and carry out the disciplinary order provided in the decision. Once respondents are served notice of BAR's intent to set aside the stay, the Director shall maintain jurisdiction, and the period of probation shall be extended until final resolution of the matter.

7. Maintain Valid License

Respondents shall, at all times while on probation, maintain a current and active registration and/or license(s) with BAR, including any period during which suspension or probation is tolled. If respondents' registration or license is expired at the time the decision becomes effective, the registration or license must be renewed by respondents within 30 days of that date. If respondents' registration or license expires during a term of probation, by operation of law or otherwise, then upon renewal of respondents' registration or license, respondents shall be subject to any and all terms and conditions of probation not previously satisfied. Failure to maintain a current and active registration and/or license during the period of probation shall also constitute a violation of probation.

8. Cost Recovery

Respondents shall pay \$7,500 to the BAR for the reasonable costs of the investigation and enforcement of case No. 77/15-6200 (OAH Case No. 2018041271). Respondents shall make such payment as follows: Respondents may pay the costs in a lump sum or according to a payment plan acceptable to BAR during the term of probation. Any agreement for a scheduled payment plan shall require full payment to be completed no later than six (6)

months before probation terminates. Respondents shall make payment by check or money order payable to the "Bureau of Automotive Repair" and shall indicate on the check or money order that it is for cost recovery payment for case No. 77/15-6200 (OAH Case No. 2018041271). Any order for payment of cost recovery shall remain in effect whether or not probation is tolled. Probation shall not terminate until full cost recovery payment has been made. BAR reserves the right to pursue any other lawful measures in collecting on the costs ordered and past due, in addition to taking action based upon the violation of probation.

9. Completion of Probation

Upon successful completion of probation, respondents' affected registration and/or license will be fully restored or issued without restriction, if respondents meet all current requirements for registration or licensure and have paid all outstanding fees, monetary penalties, or cost recovery owed to BAR.

10. License Surrender

Following the effective date of a decision that orders a stay of invalidation or revocation, if respondents cease business operations or are otherwise unable to satisfy the terms and conditions of probation, respondents may request that the stay be vacated. Such request shall be made in writing to BAR. The Director and the BAR Chief reserve the right to evaluate the respondents' request and to exercise discretion whether to grant the request or take any other action deemed appropriate or reasonable under the circumstances. Upon formal granting of the request, the Director will vacate the stay order and carry out the disciplinary order provided in the decision.

Respondents may not petition the Director for reinstatement of the surrendered registration and/or license or apply for a new registration or license under the jurisdiction of BAR at any time before the date of the originally scheduled completion of probation. If respondents apply to BAR for a registration or license at any time after that date, respondents must meet all current requirements for registration or licensure and pay all outstanding fees or cost recovery owed to BAR and left outstanding at the time of surrender.

11. Training Course

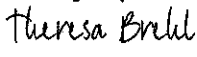
Within 60 days of the effective date of a decision, respondents shall attend a "Write It Right" presentation provided by a BAR Representative, at the location, date, and time determined by the BAR.

Within 180 days of the effective date of a decision, respondents shall complete ordered coursework or training that is acceptable to BAR and relevant to the adjudicated violation. Respondents shall submit to BAR satisfactory evidence of completion of coursework or training within the timeline specified for completion of the ordered coursework or training.

12. Supervision Requirements

Respondent Rickey Frye, Jr., shall not delegate his supervisory duties, as they relate to the business activities relevant to the probationary registration and/or license, to another person during the period of probation. Any persons employed by respondents to carry out such business activities shall be directly supervised by respondent Rickey Frye, Jr. In the event that a bona fide medical condition arises during the period of probation, which temporarily prevents respondent Rickey Frye, Jr., from exercising direct supervision over employees, notice and medical substantiation of the condition shall be submitted to BAR within ten (10) days of the medical affirmation of the condition.

DATED: November 14, 2018

DocuSigned by:

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THERESA M. BREHL
Administrative Law Judge
Office of Administrative Hearings